IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 490 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MANUBHAI MULUDAN GHADHAVI

Versus

STATE OF GUARAT

Appearance:

MR BB NAIK for Petitioner

MR BY MANKAD, APP for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 02/02/2000

CAV JUDGEMENT

Heard learned counsel Mr. B.B. Naik appearing for the petitioner and learned APP Mr. B.Y.Mankad for the Respondent State. Mr.K.B. Anandjiwala, learned counsel appeared for the original complainant and assisted learned APP Mr. Mankad during the course of

submissions.

2. The petitioner is the accused in Criminal Case registered at Khavda Police Station vide CR No. 15/98. On completion of investigation, the police filed chargesheet against all the accused mentioned in the chargesheet and as the some of the alleged offences are punishable with the extreme penalty, the case against the petitioner, along with other accused, has been committed to the Court of Sessions of District Kutch at Bhuj. Two Sessions Cases are registered as some of the accused are chargesheeted by a supplementary chargesheet and Sessions Cases are registered vide Sessions Case Nos. 106/98 and 57/99 respectively.

3. The learned Sessions Judge of Kutch-Bhuj, after committal, was to frame charge against the accused. Present petitioner submitted an application exh.77 along with other accused before the Court of Sessions under sec. 227 and 228 of the CrPC stating therein that the Court should not frame any charge against the petitioner and he should be discharged from the offences, alleged to have been committed by him. Other accused had also preferred similar application (exh.27). The applications preferred under sections 227 & 228 of CrPC were heard by the learned Sessions Judge of Kutch at Bhuj and vide order dated 27th July, 1999, the learned Sessions Judge dismissed aforesaid applications.

4. Feeling aggrieved by the order rejecting the application exh.77, the present petitioner has preferred this Criminal Revision Application. The petitioner is the forest official. Some of the co-accused who are also forest officials, had preferred discharge application along with the petitioner (exh.77) before the Sessions Judge, Kutch at Bhuj which was rejected. Some of the applicants of discharge application exh.77 (before Sessions Court), preferred Cri. Revision Application No. 464/99 before this Court which came to be allowed by the Court vide judgment dated 10.9.1999 with another Cri. Revision Application No. 419/99 preferred by Deputy Conservator of Forest Mr. Katariya.

5. It is not a matter of dispute that right from Deputy Conservator of the Forest till the Forest Guard, all those who were present at the place of incident, have been chargesheeted . It is not a matter of dispute that all the forest officials were present near the spot of incident, at the relevant time and date, in the capacity of Government Servants and that they are Civil Servants or say Public Servant within the meaning of Sec.21 of IPC. They were on the spot of event, with the staff members working in the Forest Division of West.

6. I would like to point out the case put forward by the police against all the accused in the challan filed before the Criminal Court, so that nature of allegations against the present petitioner and the case of the prosecution qua the present petitioner can be appreciated in proper perspective.

7. According to the prosecution, petitioner No.1 is a Forester and was with one Senior Officer Mr.H.S.Vankani, Assistant Conservator of Forest heading West Division. (Dist.:Kutch). Undisputedly, petitioner was accompanying Mr. Vankani in official vehicle and he was present under the instructions of the District

Head and his immediate supperior. It is not a matter of dispute that the present petitioner was having any powers to arrest the person and he was supposed to act as per the orders of immediate superiors who were present at the place of incident. In the incident, one Bavji Jadeja is murdered by a group of assailants who was inimical to them. This Bavji was one of the informant to the Forest Department. According to the say of the prosecution, he had given some information to the Conservator of Forest Mr. Shukla through one of the responsible citizen of District Kutch. It is on record that Mr. Anup Shukla, an IFS Officer, was heading the Forest Circle of District Kutch and had directed Mr. Vankani to act in response to the information given by Bhavji Jadeja. Mr. Vankani was told that he should proceed to village Loriya and meet Mr. Bavji Jadeja before 12.30 and he was also directed to act on receipt of information given by Bavji Jadeja. It is the case of the prosecution that accused no.4 Deputy Conservator of Forest of Forest Division (East) was also asked by Mr. Anup Shukla that he should reach to village Loriya and meet Mr. Vankani. He was also asked to help Mr. Vankani in his duties. One Dy.Conservator of Forest Mr. Varma was also similarly directed by Mr. Anup Shukla.The totality of the facts indicate that Bavji Jadeja was to give some information with regard to some forest offence committed in Forest Division (West). Ultimately, plain reading of the police papers shows that on information given by Bavji Jadeja two motor trucks loaded with Charcoal were apprehended by Asstt. Conservator of Forest Mr. Vankani and both the trucks were taken to a nursery. Drivers of both the vehicles were interrogated by Mr. Vankani and they were taken to the spot of incident from where they had loaded Charcoal in the truck. It is clear from the papers that both these apprehended trucks were seized under panchanama and keys thereof were also taken by the forest officials and these trucks were put under surveillance of forest guard posted at the very nursery. It is not a matter of much relevance whether Bavji Jadeja was to be carried at the place of incident or actually he was requested to come to accompany forest officials or he himself volunteered to accompany raiding party. But it is a fact that all the forest officials chargesheeted by the police, thus, were present at the scene of incident, where Bavji Jadeja was murdered. It can be said in nutshell that the present petitioner has to face the trial, as he had abetted the alleged crime and as he failed in not performing his duties, by illegal omission. The petitioner had abetted the crime, in view of the sections 107 and 108 of the Code of Criminal Procedure.

8. While disposing of Criminal Revision Application

No. 419/99 and 464/99, when a pointed query was raised, learned APP Mr. Mankad has fairly conceded that the case against the petitioners of said petitions solely banks on the clause "thirdly" of sec.107 of I.P.Code, meaning thereby that according to the prosecution, the petitioners had intentionally aided the crime or say offence by illegal omission, and no overt act or participation in the offence committed against Bavji Jadeja is alleged against any of the petitioners so that the case of intentional aiding "by an act" is missing against the petitioners. Mr. Mankad has fairly admitted that in this case also, same is the situation and he further submitted that even so far as all the forest officials who have been chargesheeted, the case of the prosecution banks upon clause "thirdly" of sec.107 of I.P.Code. It is the case of the prosecution that by doing the illegal omission, the petitioner has abetted the main offenders who have committed murder of Bavji Jadeja and other offences allegedly committed by other accused, who are referred in the first part of police challan filed under sec. 173 of the Code of Criminal Procedure. The petitioner is alleged to have aided by not taking due care and/or caution. It is also alleged that though one of the Forest Officer was holding a fire arm, has not cared to use it inspite of request of one the witnesses viz. Makbul. Mr. Mankad has argued that accused No.4, as superior in rank, was otherwise bound to direct accused no.5 to use the fire arm.

9. Countering the prosecution case, ld. Counsel Mr. Naik has raised main contention that the learned Sessions Judge has assumed or presumed many things for which he was not authorised legally and heavily placed reliance on the contention that the learned Sessions Judge has not specifically mentioned in its order that which of the ingredients in the police papers links the petitioner with the crime, especially crime committed by abetting the original accused. Mr. Naik has further submitted that learned Sessions Judge presumed that accused no.4 or say other accused were knowing the fact of informing Bavji of group headed by accused no.21 Mohan Bhanusali, or the animosity between them, without direct evidence. The statutory duties enumerated in the Forest Manual and the Act, or the protections, otherwise available to the Civil Servants, are not considered by the learned Sessions Judge. The learned Sessions Judge has erred in holding that no conscious steps were taken or no attempt was made even in preventing the forest crime. Role of forest officials is also not considered and is ignored. Mr. Naik has also argued that on the strength of the totality of the facts available on record, the Court should record its finding and the learned Sessions Judge

has erred in not doing so. Mr. Naik has further submitted that petitioner should not be asked to face the trial only because he was present at the spot of the incident and the investigating agency found the conduct or behaviour of the petitioner unusual by running away from the spot of incident. The case of the prosecution against the present petitioner or say all forest officials is under Section 107 and 108 of the IPC. Mr. Naik has further submitted that the learned Sessions Judge has erred in not appreciating two material facts viz. (i) that the truck arrived at the spot of incident with a group of 60 to 70 assaillants with weapons and dashed with the jeep car of accused no.4. It is also not a matter of dispute that the jeep car of accused no.4 was damaged because of the hit given by the truck reached to the spot, and (ii) that one of the forest officials namely Ratneshwar had sustained injuries, may be simple or superfluous, by fire arm on or near his neck. Mr. Y.L.Verma has stated about this in his statement. Mr. Naik has further submitted that the petitioner (accused) was present on the spot but had no connection with actual commission of the offence committed by the assailants who had come to the spot in two vehicles viz. jeep car and motor truck. Mr. Naik has submitted that the learned Sessions Judge has committed an error in interpreting word "duty" and plain reading of the order takes us to conclusion that the learned Sessions Judge has not interpreted the word duty only as "legal duty" or "obligatory duty" in the capacity of a public servant, but also as the "moral duties or social obligations in a very broad compass." Mr. Naik has submitted that there must be a legal obligation and not merely moral, social or religious obligation. Mr. Naik has further submitted that mere presence on the occasion of the commitment of an offence does not amount to abetment within the meaning of sec. 107, unless there is an obligation cast by the law upon the person present to prevent the commission of the offence. Mr. Naik has further submitted that even if it is presumed that there is a illegal omission, the same should be "intentional illegal omission". The intentional omission must have been done by the accused so that the actual offender can complete the crime or continue with the commission of such punishable act. Mr. Naik has further submitted that even if it is assumed that there is a moral obligation of an individual, that by itself, without anything more, is not sufficient to frame a charge against the person concerned. Presence of intention is most relevant.

10. The prosecution has tried to bring out the case, according to ld. APP Mr. Mankad, that a crowd had come to the spot only to finish Bavji Jadeja and/or his

associates or friends and the Forest Officials have failed in protecting them though Bavji Jadeja was informant of the forest department. The prosecution case against the petitioner and other forest officials is that (i) they were present and their presence was in the capacity of the public servant, (ii) Bavji Jadeja and companions were assailed because Bavji Jadeja was the informant of the forest department, (iii) the petitioners are public servant and serving with the forest department, (iv) the forest officers including the petitioner could have arranged for sufficient police force before reaching the spot of incident (v) one of the forest officer viz. Assistant Conservator of Forest Mr. Vankani was armed with the weapon i.e. revolver of his ownership, (vi) accused no.4 being senior in rank of his own or as stated by one of the witnesses viz. Makbul would have ordered Mr. Vankani to use his fire arm (vii) instead of arresting of the persons who had come to the spot, the petitioner along with other forest officials ran away from the spot and hide himself in the nearby forest and (viii) the petitioner along with other officers have not cared to shift the injured Bavji to the nearest hospital and none of the petitioners including accused No.4 Mr. Vankani have informed the police about the incident and though accused no.4 and other forest officials (all of them) were holding weapon, but they have not cared to use these weapons. Thus, there is willful omission and therefore,the petitioners (all the forest officials) are abettor to the crime.

11. All the arguments advanced in this case as stated above coupled with other arguments advanced by Mr. Naik appearing for the petitioners as well as Mr. B.Y. Mankad, learned APP for the Respondent, were also advanced by them in Cri. Revision Application No. 419/99 & Cri.Rev. Application No. 464/99 and after appreciating elaborately and after considering number of authorities cited by both the sides, this Court, vide its judgment dated 10.9.1999, allowed aforesaid Revision Applications as indicated therein and discharged the revisioners. While allowing aforesaid Revision Applications, this Court has categorically held and observed for the detailed reasons given in the aforesaid judgment that " If we ignore all the submission of Mr. Naik to the effect that in reality the petitioners were witnesses to the incidents and they are implicated in the crime on resumption of duties by new Investigating Officer, even then, prima facie reading of police papers do not contain anything under which prima facie this Court can say that the petitioners have missed any legal obligation cast on them."

12. Thus, it is clear that there is no legal duty on

the part of the petitioner to prevent offence under IPC. There is no illegal or intentional omission on the part of the petitioner and other forest officials. Even though there is a moral duty, the same cannot take place of legal duty. Mere presence on the spot of incident by itself would not make them abettor in absence of any overt act.

13. The case of the present petitioner is also similarly situated. The petitioner was in another vehicle i.e. in the vehicle of Asstt. Conservator of Forest Mr. Vankani who is the head of the Forest Division where alleged forest offence is committed. This fact, by itself, would not make petitioner an accused who is a Forester and has to act as per the instructions and has no major role to play. The petitioner has not played any active part in the incident. Mr. Mankad has tried to submit that omission on the part of the present petitioner should be construed as an illegal omission amounting to an abetment within the meaning of sec.107 of IPC, but in view of the provisions of sec.107, clause "thirdly" of IPC, the prosecution should specifically plead and prima facie establish that the omission was not only illegal, but was also intentional. There is no specific allegations of omission made against the petitioner. So, obviously, there is a little scope to say anything about the alleged illegality for so-called omission. Intention is totally missing and so, this Court feels that the Sessions Judge ought to have also discharged the petitioner. As observed above, the gravity and velocity of the offence committed was such that it would have been impossible for the present petitioner or say for other forest officials to take any steps against 60/70 persons armed with lethal weapons.

(14) Duties of the present petitioner is defined in the Forest Manual itself. I do not see any need to reproduce it because this Court has already reproduced the duties of Deputy Conservator of Forest, Foresters and Forest Guard while dealing with above-referred Cri. Revision Applications. Petitioner is a Forester and obviously an officer inferior in rank to the petitioner of Cri. Revision Application No.419/99 and he cannot have any greater responsibility than his superior officers who were present on the spot of incident. According to the case of the prosecution, vehicle of the forest department was damaged by the hit of a motor truck and large group elighted from that truck with lethal weapons and those persons have assaulted the vehicle, person of Bavji Jadeja, wherein forest official had also sustained gun shot injury. For the sake of argument, it is accepted that the present petitioner has not played any role in saving the life of Bavji Jadeja, even than

the conduct of the petitioners cannot be said to be unnatural conduct. This Court has considered various aspects of duties while dealing with above referred two Cri. Revision Applications and by placing reliance on various judgments of the Apex Court, this Court has held that there was no legal duty on the part of any of the forest officials who were present on the spot of incident to save Bavji Jadeja. In response to a query raised by this Court, learned APP Mr. Mankad has failed to convince this Court that any of the Forest Officials including the present petitioner were obliged to prevent commission of offence under IPC and that it was their duty or legal obligation to do so. It is also important to note that prior to change of Investigating Officer, the present petitioner and other forest officials were witnesses to the incident and on immediate change of Investigating Officer, they were shown as an accused. So, without going into further discussion, and adopting the reasons assigned by this Court in the above referred two Cri.Revision Applications while discharging the petitioners of said applications, and treating said reasons as a part of reasons given in this Cri.Revision Application, I am inclined to allow this Revision Application also as prayed for.

(15) For the reasons aforesaid and in view of the settled legal position, this Court arrives at a conclusion that interference in the findings arrived at by the learned Sessions Judge while deciding the application preferred by the present petitioners under sections 227 & 228 of the CrPC is required as the findings arrived at by the learned Sessions Judge concerned are without proper appreciation of papers of investigation, not supported by evidence on record and are based on assumptions and presumptions. The same are also arrived at without properly appreciating relevant provisions of law amounting to an error of law resulting into miscarriage of justice and, therefore, following order is passed.

(16) Cri. Revision Application is allowed. The judgment and order dated 27.7.1999 passed by the learned Sessions Judge Kutch at Bhuj below application exh.77 in Sessions Case No. 106 of 1998 is hereby quashed and set aside. The petitioner herein is hereby ordered to be discharged as the element of abetment on account of "illegal omission" is missing on the papers of police investigation.

(17) Rule is made absolute. No order as to costs.

02-02-2000 [C.K. BUCH, J]
*rawal